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10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF WASHINGTON
12 The Honorable Stanley A. Bastian
13

14 United States of America,
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16 Plaintiff,
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18 v.
19 Paul Hines,
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21 Petitioner.
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No. 2:03-CR-2023-SAB

28 U.S.C. § 2255
Petition to Vacate Sentence
and for Immediate Release

With Oral Argument
December 9, 2015 at 3:00 pm
Yakima, WA

23 Paul Hines petitions this Court to issue an order vacating his
24 sentence, issuing a new judgment, and providing for his immediate
25 release. As explained in detail below, Mr. Hines has already served
more than the ten-year maximum sentence that would have applied
without the determination that he was an Armed Career Criminal. He

1 is thus currently serving a sentence in excess of that authorized by
2 law.¹

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4 The defense has requested an expedited hearing on this petition
5 because of the liberty interest involved. The Government is in
6 agreement with an expedited hearing, provided that it is able to
7 respond to this petition no later than December 2, 2015. The defense
8 has no objection to that response deadline and requests twenty-four
9 hours to reply following the Government's filing.
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12 Additionally, because this petition "involves only a conference or
13 hearing on a question of law" Mr. Hines need not be present for the
14 petition's argument or adjudication. *See* Fed. R. Crim. P. 43.
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16 I. Background

17 On March 11, 2003, a grand jury returned a two-count
18 Superseding Indictment charging Mr. Hines with felon in possession of
19 a firearm, in violation of 18 U.S.C. § 922(g)(1), and false statement in
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22 ¹ Title 28 U.S. Code § 2255 specifically provides that any motion
23 claiming that a sentence is "in excess of the maximum authorized by
24 law" should be made in the "court which imposed the sentence[.]" This
25 Court therefore has jurisdiction over this habeas action.

1 acquisition of a firearm under 18 U.S.C. § 922(a)(6). A § 922(g)(1)
2 violation normally carries a statutory maximum ten-year term of
3 imprisonment; likewise with a violation of § 922(a)(6). *See* 18 U.S.C. §
4 924(a)(2). At that time, Mr. Hines had two convictions for Second
5 Degree Burglary in Washington, which were determined to be
6 qualifying offenses under the Armed Career Criminal Act (“ACCA”), 18
7 U.S.C. § 924(e)(2)(B).
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10 In light of newly decided Supreme Court precedent that
11 invalidated the so-called “residual clause” of the ACCA, however, these
12 burglaries do not properly form the basis for the ACCA sentencing
13 enhancement. *See Johnson v. United States*, __ U.S. __, 135 S. Ct. 2251
14 (2015). In *Johnson*, the Supreme Court overruled *Sykes v. United*
15 *States*, __ U.S. __, 131 S.Ct. 2267 (2011), and *James v. United States*,
16 550 U.S. 192 (2007), and held that imposing an increased sentence
17 under the residual clause of the ACCA violates the Constitution’s
18 guarantee of due process. Given *Johnson*, Mr. Hines’ ACCA sentence
19 can be upheld only if his Washington State burglary convictions were
20 violent felonies under either the categorical or modified categorical
21 approach. For the reasons discussed below, the Washington State
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1 burglaries do not qualify as predicate felonies under ACCA under any
2 approach. Mr. Hines is therefore actually innocent of being an Armed
3 Career Criminal and is entitled to immediate relief as he has been
4 incarcerated beyond the ten-year statutory maximum applicable to his
5 crime.
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7 8 **II. Discussion**

9 **A. Washington's second-degree burglary statute is** 10 **categorically broader than the generic definition of** 11 **burglary.**

12 To determine whether a past conviction is for a "violent felony"
13 under the ACCA, "courts use what has become known as the
14 'categorical approach': They compare the elements of the statute
15 forming the basis of the defendant's conviction with the elements of the
16 'generic' crime—*i.e.*, the offense as commonly understood." *Descamps v.*
17 *United States*, 133 S. Ct. 2276, 2281 (2013). "The prior conviction
18 qualifies as an ACCA predicate only if the statute's elements are the
19 same as, or narrower than, those of the generic offense." *Id.*
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22 Washington's second-degree burglary statute, the crime to which
23 Mr. Hines pled in 1986 and 1989 and formed the basis of his ACCA
24 sentence, was former RCW § 9A.52.030(1). That provision provided:
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1 “[a] person is guilty of burglary in the second degree if, with intent to
2 commit a crime against a person or property therein, he enters or
3 remains unlawfully in a building other than a vehicle.” *State v.*
4 *Deitchler*, 75 Wash. App. 134, 136, 876 P.2d 970, 971 (1994) (quoting
5 former RCW § 9A.52.030(1)); *see also State v. Couch*, 44 Wash. App. 26,
6 29, 720 P.2d 1387, 1389 (1986) (requiring “the unlawful entry or
7 remaining unlawfully in a building, and the intent to commit a crime
8 within”). The statute defined “building” to include

9 . . . any dwelling, fenced area, vehicle, railway car, cargo
10 container, or any other structure used for lodging of persons
11 or for carrying on business therein, or for the use, sale, or
12 deposit of goods; each unit of a building consisting of two or
13 more units separately secured or occupied is a separate
14 building.

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16 RCW § 9A.04.110; *Couch*, 44 Wash. App. at 29. Generic “burglary” is
17 defined as under federal law as “unlawful or unprivileged entry into, or
18 remaining in, a building or structure, with intent to commit a crime.”
19 *Descamps*, at 2283.

20
21 For two independent reasons, the Washington burglary statute
22 does not align with the federal definition. First, in 2003, the Ninth
23 Circuit has held that second-degree burglary is not a categorical crime
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1 of violence because “burglary” “must involve a ‘building or structure’
2 under *Taylor*,” and “[s]ome things that are [buildings] under
3 Washington law (e.g., fenced areas, railway cars, and cargo containers)
4 are not buildings or structures under federal law.” *United States v.*
5 *Wenner*, 351 F.3d 969, 972–73 (9th Cir. 2003); *see also United States*
6 *v. Guerrero-Velasquez*, 434 F.3d 1193, 1196 n.3 (9th Cir. 2006).

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9 Second, Washington second degree burglary does not require “an
10 unlawful entry along the lines of breaking and entering,” which is also
11 an element of generic burglary. *See Descamps v. United States*, 133 S.
12 Ct. 2276, 2285 (2013). Under Washington law, a person may be guilty
13 of burglary even without an unlawful entry, such as if he enters
14 lawfully under a limited license and then proceeds to exceed the scope
15 of that license by “remaining unlawfully.” *See, e.g., State v. Collins*,
16 110 Wash. 2d 253, 256, 751 P.2d 837, 838 (1988); *see also, e.g., United*
17 *States v. Wilkinson*, 589 F. App’x 348, 350 (9th Cir. 2014) (holding that
18 Washington residential burglary statute is overbroad as to the
19 “remains unlawfully” language) (unpublished).

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24 **B. The modified categorical approach is not appropriate**
25 **in this case because the Washington second-degree**
burglary statute is indivisible.

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2 If defendant is convicted under an “indivisible statute”—*i.e.*, one
3 not containing alternative elements—that criminalizes a broader
4 swath of conduct than the relevant generic offense,” then sentencing
5 courts may not apply the modified categorical approach, and the
6 analysis ends at the categorical approach outlined above. *Id.* at 2281–
7 82.
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9
10 In *Descamps*, the U.S. Supreme Court noted the definition of a
11 divisible statute as one “that sets out one or more of the *elements* of the
12 offense in the alternative.” *Id.* at 2281 (emphasis added). If the statute
13 sets forth elements in the alternative then “the modified categorical
14 approach permits sentencing courts to consult a limited class of
15 documents, such as indictments and jury instructions, to determine
16 which alternative formed the basis of the defendant’s prior conviction.”
17 *Id.*
18

19
20 In *Rendon v. Holder*, 764 F.3d 1077 (2014), the Ninth Circuit
21 clarified the test to determine whether a statute was divisible. It noted
22 that “while indivisible statutes may contain multiple, alternative
23 *means* of committing the crime, only divisible statutes contain
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1 multiple, alternative *elements* of functionally separate crimes.” *Id.* at
2 1085 (emphases added). “Any statutory phrase that—explicitly or
3 implicitly—refers to multiple, alternative means of commission must
4 still be regarded as indivisible if the jurors need not agree on which
5 method of committing the offense the defendant used.” *Id.* at 1085.
6
7 Elements are “those circumstances on which the jury must
8 unanimously agree,” while “means” are “those circumstances on which
9 the jury may disagree yet still convict.” *Id.* at 1086. Thus, the
10 touchstone of divisibility is juror unanimity.
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13 The facts of *Rendon* highlight the importance of this distinction.
14 There, the Ninth Circuit applied the divisibility test to California’s
15 second degree burglary statute, which prohibited entry “with intent to
16 commit grand or petit larceny or any felony.” *Id.* at 1089. The
17 Government argued that the use of “or” indicated alternative elements.
18 The court emphasized that the phrasing of the statute did not answer
19 the relevant question: “[T]he fact that section 459 contains two types of
20 offenses preceding an “or” and a general category of offenses following
21 the ‘or’ is in itself of no significance.” *Id.* at 1090. If the jury is not
22 required to find a particular phrase set forth in a statute unanimously
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1 in order to convict, then it is merely a means and not an element. The
2 statute is thus indivisible.

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4 The recently-decided *United States v. Dixon*, No. 14-10318 (9th
5 Cir., November 20, 2015) similarly explains that “[a] statute is not
6 divisible merely because it is worded in the disjunctive.” (Slip. Op. at
7 11) (attached as Exhibit A). The statute at issue in *Dixon*, California
8 Penal Code § 211 (robbery), had two disjunctively worded phrases –
9 “person *or* immediate presence,” and “force *or* fear.”² The California
10 model jury instructions explain that the elements of CPC § 211 include,
11 in relevant part, that “(1) the defendant took property that was not his
12 own . . . (3) the property was taken from the other person *or* his
13 immediate presence. . . (5) the defendant used force or fear to take the
14 property *or* to prevent the other person from resisting. . . [.]” *Dixon*, at
15 11 (emphasis added). *Dixon* held that, because the jury would not need
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22 ² California Penal Code § 211 provides that “Robbery is the felonious
23 taking of personal property in the possession of another, from his
24 person or immediate presence, and against his will, accomplished by
25 means of force or fear.”

1 to agree on the disjunctively worded alternatives in (3) and (5), the
2 statute was therefore indivisible:
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4 . . . jurors must agree that element (3) is met—but the jury
5 can return a guilty verdict even if some jurors believe the
6 defendant took property from the victim’s person and other
7 jurors believe the defendant took the property from the
8 victim’s immediate presence. Similarly, for element (5), a
9 jury can return a guilty verdict even if some jurors believe
10 the defendant used force and others believe the defendant
11 used fear.

12 *Id.* at 12.

13 Like the California second-degree burglary and robbery statutes,
14 the Washington State second-degree burglary statute is indivisible
15 because it contains alternative *means* of committing the crime and not
16 alternative *elements*.

17 Washington case law is clear that “building” is a single element of
18 second-degree burglary and does not encompass separate, alternative
19 crimes. *See, e.g., State v. Ponce*, 269 P.3d 408 (Wash. App. 2012) (“[T]he
20 first element of second degree burglary the State was required to prove
21 [was] that the defendant entered or remained unlawfully in a
22 building”); *State v. Soto*, 727 P.2d 999 (Wash. App. 1986) (“Second
23 degree burglary requires the following elements: The actor must, with
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1 the intent to commit a crime against a person or property therein,
2 enter or remain unlawfully in a building”).

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4 Even though this statute contains disjunctive phrases, the
5 Washington Pattern Instructions—Criminal (WPIC) 60.04—provides
6 that one of the elements of second degree burglary is: “That on or about
7 (date), the defendant entered or remained unlawfully in a building
8 [other than a dwelling][.]” The statute defining building lists different
9 types of structures that satisfy that element of the offense, but as a
10 matter of state law, jurors need not agree on definitional alternatives.
11
12 *State v. Linehan*, 147 Wash.2d 638, 56 P.3d 542 (2002). Indeed,
13 Washington courts have repeatedly rejected the contention that jurors
14 must agree on alternatives contained within definitional statutes. *See*,
15 *e.g. State v. Laico*, 987 P.2d 638 (Wash. App. 1999); *State v. Strohm*,
16 879 P.2d 962 (Wash. App. 1994); *State v. Garvin*, 621 P.2d 215 (Wash.
17 App. 1980).

18
19 Similarly, the Washington state pattern instruction defining
20 “building” does not instruct jurors that they must unanimously agree
21 on the type of structure entered to convict a defendant of second degree
22 burglary. WPIC 2.05. In short, the definition of “building” provides

1 alternative means of committing that crime, but does not define
2 functionally separate crimes. Therefore the statute is indivisible.
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4 Because the factual inquiries appropriate under the modified
5 categorical approach apply only to divisible statutes, it should not be
6 applied here. Washington second-degree burglary is indivisible and
7 overbroad. It is not a categorical match to the generic definition of
8 burglary. The Washington burglary statute can therefore never be
9 used as an ACCA predicate.
10

11 This conclusion is in line with the as yet undisturbed holdings of
12 *Wenner* and *Wilkinson*, and it is the conclusion that was reached by
13 two other district courts in the Ninth Circuit upon reviewing similar
14 ACCA habeas petitions in light of *Johnson*. These district court
15 decisions are discussed below.
16

17
18 **C. Mr. Hines is “actually innocent” of being an Armed
19 Career Criminal.**

20 Because the Washington second-degree burglary statute is
21 overbroad, Mr. Hines’ convictions under that statute cannot be used as
22 ACCA predicates. He has therefore established a sentencing innocence
23 claim (i.e. that he is “actually innocent” of the ACCA enhanced
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1 sentence) and is serving an illegal sentence under the ACCA in
2 violation of the Due Process Clause.
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4 Under the Antiterrorism and Effective Death Penalty Act of 1996
5 (“AEDPA”), “a state prisoner ordinarily has one year to file a federal
6 petition for habeas corpus, starting from ‘the date on which the
7 judgment became final by the conclusion of direct review or the
8 expiration of the time for seeking such review.’” *McQuiggin v. Perkins*,
9 133 S. Ct. 1924, 1929 (2013) (quoting 28 U.S.C. § 2244(d)(1)(A)).
10 Additionally, claims not raised on direct appeal may be considered
11 procedurally defaulted. *See Massaro v. United States*, 538 U.S. 500,
12 504 (2003).
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16 This bar can be overcome, however. A petitioner may overcome
17 the bar by showing that: (1) there was a cause for the default and (2)
18 that a petitioner is suffering prejudice as a result. *Martinez v. Ryan*,
19 132 S. Ct. 1309, 1316 (2012). In the alternative, the bar can be
20 overcome by “a credible showing of actual innocence.” *McQuiggin v.*
21 *Perkins*, 133 S. Ct. 1924, 1931 (2013). “Actual innocence, if proved,
22 serves as a gateway through which a petitioner may pass”
23 notwithstanding the existence of a procedural bar. *Id.* at 1928.
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1 Mr. Hines is “actually innocent” of being an armed career
2 criminal because he received a sentence for which he was statutorily
3 ineligible. He has already served longer than the statutory maximum
4 of 10 years for his underlying conviction. This is a constitutional
5 violation. In recent months and weeks, at least two district courts in
6 the Ninth Circuit reviewing habeas corpus petitions in light of *Johnson*
7 have reached this conclusion. *See, e.g., Summers v. Feather*, No. 3:14-
8 CV-00390-SU, 2015 WL 4663277 (D. Or. Aug. 5, 2015) (explaining that
9 second degree burglary in Washington State does not qualify as a
10 predicate felony under ACCA in light of *Johnson*; issuing a scheduling
11 order for resentencing based on *Johnson* claim); *Charles Murray v.*
12 *United States*, No. 3:15-cv-05720-RJB (E. D. Wa. Nov. 9, 2015)
13 (attached as Exhibit A) (explaining that second degree burglary in
14 Washington State does not qualify as a predicate felony under ACCA in
15 light of *Johnson*; vacating sentence and ordering release of petitioner).
16

17 The *Summers* court found that “[a]n improper ACCA sentence
18 enhancement satisfies the actual innocence requirement of escape
19 hatch jurisdiction” in the § 2241 habeas context. *Summers v. Feather*,
20 2015 WL 4663277. Similarly, the *Murray* court explained that Mr.
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1 Murray was “‘actually innocent’ of being an armed career criminal for
2 the purposes of showing cause and in excusing his procedural default”
3 and that he had “shown prejudice—he was sentenced in excess of the
4 statutory maximum.” *Murray*, slip op. at 9.
5

6 **III. Conclusion**

7

8 In conclusion, Mr. Hines is not an Armed Career Criminal and he
9 is serving an illegal sentence. This Court should vacate Mr. Hines’
10 conviction and sentence in light of *Johnson*. This Court should further
11 order that Mr. Hines be released from custody immediately and that a
12 new Judgment be issued specifying a statutory sentence of ten years.
13

14 //

15 Dated: November 20, 2015.
16

17
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Certificate of Service

I hereby certify that on November 20, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Ian L. Garriques, Assistant United States Attorney.

s/ Alison K. Guernsey
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